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SIXTH DIVISION

APRIL 29, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 3671
	)	
ALEXANDER COLE,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding

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JUSTICE ROBERT E. GORDON delivered the judgment of the court.  
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

**ORDER**

*HELD:* Where the trial court failed to admonish the jury regarding the fourth *Zehr* principle, that the defendant's failure to testify should not be held against him, the defendant has not met his burden of showing that the evidence was so closely balanced that the guilty verdict may have resulted from the error; the trial conviction is affirmed.

Defendant, Alexander Cole, was convicted by a jury of possession of a controlled substance with intent to deliver within 1000 feet of a school. After hearing aggravation and mitigation, he was sentenced to 14 years in the Illinois Department of Corrections. During jury selection, the trial court admonished the prospective jurors regarding three out of the four *Zehr* principles as required by Illinois Supreme Court Rule 431(b), omitting the principle that the

defendant's failure to testify should not be held against him. At the end of trial, the jury returned a guilty verdict. Defendant argues that the trial court violated Rule 431(b) when it failed to admonish the jury regarding the fourth *Zehr* principle: the defendant's failure to testify should not be held against him. On appeal, defendant contends that we must reverse the conviction by the jury and remand the cause for a new trial because the evidence in the case was so closely balanced that the error contributed to the jury's guilty verdict. We affirm.

### BACKGROUND

The following testimony was adduced at defendant's trial.

On January 28, 2008 at approximately 4:30 p.m., four Chicago police officers assigned to the 11th district gang unit were patrolling the northwest side of Chicago in an unmarked police vehicle. The officers noticed two individuals, one of whom would be later identified as defendant, standing on the north side of the street, and decided to set up a surveillance of the individuals from across the street. One of the officers, Officer Mireya Lipsey, who had been a police officer for 8.5 years and had made over 1,000 narcotic arrests at that point, exited the vehicle and positioned herself on the roof of a three-story multi-unit building. The remaining three officers, Officers Brian Cygnar, James Carroll, and Patrick Staunton re-located themselves in the unmarked vehicle two blocks away from where Lipsey had set up her surveillance.

Officer Lipsey was approximately 150 feet away from defendant, who was standing next to another individual, later identified as Alphonsia McFarland. Lipsey heard McFarland shout "blows, blows," which, based upon Lipsey's experience, she knew to be street terminology for heroin. Using her binoculars, Lipsey observed an unidentified individual approach defendant

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and engage in a short conversation. She then observed the individual handing U.S. currency to defendant. Defendant placed the money in his pocket and proceeded to walk away through a small gravel driveway to a chain link fence. When defendant arrived at the fence, he bent down, picked up a yellow potato chip bag from the bottom of the fence, removed a small object from inside the bag, and placed the bag back at the bottom of the fence. Defendant then walked back to the individual and handed him the small object, and the individual then left. Lipsey observed defendant engage in three more identical transactions with different individuals. Lipsey testified that there was nothing blocking her view of these transactions.

After these four transactions, which transpired over a 17 minute period, Lipsey observed defendant and McFarland begin to cross the street. Lipsey had been maintaining radio contact with Cygnar, Carroll and Staunton during the time she was observing. She radioed to them, disclosed in full what she had observed, provided a physical description of defendant and McFarland, and instructed the officers to detain the two individuals. Cygnar, who was driving the vehicle, proceeded toward the location that Lipsey had provided. As the officers approached the location, they observed defendant and McFarland crossing the street. All three officers exited the vehicle and detained and patted down both individuals for weapons. Staunton walked defendant down the sidewalk, while Cygnar walked McFarland down the sidewalk, so that Lipsey, who had maintained her position on the roof, could observe them and make a positive identifications.

Lipsey then directed Carroll to the chain link fence where Carroll found the potato chip bag, which he described as approximately the size of his hand. He testified that the bag was “crumpled a little bit,” so he had to open it. Inside the bag, Carroll found a little plastic bag,

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which contained seven individual foil packets, which were approximately the size of a thumbnail, folded at each corner, encased in yellow tape on the back and clear tape on the front. Carroll testified that there was nothing else in the area that was remotely yellow. Carroll then placed the bag in his pocket and returned to the police vehicle.

At this point, Cygnar left Carroll and Staunton with defendant and McFarland to pick up Lipsey from her surveillance position. Upon arriving back to Carroll and Staunton, Lipsey again positively identified defendant and McFarland as the two individuals she had observed earlier. The individuals were then told that they were under arrest. All four officers, defendant, and McFarland entered the police vehicle and proceeded to the police station.

At the station, Staunton conducted a search of defendant and McFarland. Staunton recovered \$89 from defendant's front pants pocket, but nothing from McFarland. Staunton gave the money to Cygnar, who then inventoried the U.S. currency as well as the potato chip bag and its contents.

During jury selection, the trial court informed the venire of the following principles:

"Under the law the Defendant is presumed to be innocent of the charge against him, and presumably remains with him throughout every stage of the trial and during your deliberations on the verdict, and is not overcome until from all in the case you are convinced beyond a reasonable doubt that the Defendant is guilty.

The State has the burden of proving the guilt beyond a reasonable doubt, and that burden remains on the State throughout the case.

The Defendant is not required to prove his innocence, nor is he required to present any evidence on his own behalf. He may rely on the presumption of innocence."

The trial court continued with its questioning of the prospective jurors as a group, and said:

"At this time I am going to ask you a few questions as a group. If your answer to any of

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these questions is yes, please raise your right hand. I will ask your name so that I can follow up with you when I speak to you individually.

Is there anybody here who does not understand and accept the following basic principles of our legal justice system, that a person accused of crime is presumed to be innocent of the charge against him?

Is there anybody here who does not understand and accept that proposition? [No response].

No hands have been raised.

Anybody here who does not understand and accept that the presumption of innocence stays with the Defendant throughout the trial, and is not overcome unless from all of the evidence you believe that the State proved his guilt beyond a reasonable doubt? Anybody here who does not understand and accept that? [No response].

No hands have been raised.

Is there anybody here who does not understand and accept that the State bears the burden of proving this Defendant guilty beyond a reasonable doubt? [No response].

No hands have been raised.

Anybody here who does not understand and accept that the Defendant does not have to present any evidence on his own behalf? He may rely on the presumption of innocence? [No response].

No hands have been raised.”

The trial court then inquired from each prospective juror whether he or she could be fair and impartial, and each prospective juror answered in the affirmative. After the trial court’s inquiry, both the State and defense had an opportunity to ask questions of the prospective jurors. Two potential jurors were dismissed for cause and two new prospective jurors were selected and questioned individually. Both prospective jurors indicated that they could be fair and impartial jurors. The State and defense were again provided an opportunity to question the two new prospective jurors. After this questioning, the jury was selected.

At trial, all four officers testified for the State and positively identified defendant as well as the potato chip bag and its contents. A forensic scientist, who analyzed the contents of the potato chip bag, also testified for the State. He weighed the contents of one of the foil packets that were found inside the potato chip bag; the contents weighed 0.1 grams. He then conducted a two part chemical test on the contents of the foil packet, and determined that based upon a reasonable degree of scientific certainty, the foil packet tested positive for the presence of heroin. Defendant, age 57, did not testify or present any evidence on his behalf.

After closing arguments, the trial court instructed the jury. Part of the instructions included that:

“The defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the this trial and during your deliberations on the verdict and is not overcome unless from all of the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.

The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict.”

### ANALYSIS

On appeal, defendant argues that we must reverse the conviction of the jury and remand the cause for a new trial because the trial court violated Illinois Supreme Court Rule 431(b) when it failed to admonish and ask the venire about the fourth *Zehr* principle: the defendant’s refusal to testify should not be held against him. Defendant further argues that the trial court’s error in violating Rule 431(b) requires reversal under the first prong of the plain error rule

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because the evidence in the case was so closely balanced that the error contributed to the guilty verdict.

Although our supreme court rules are not statutes, they have “the force of the law, and the presumption must be that they will be obeyed and enforced as written.” *Robidoux v. Oliphant*, 201 Ill.2d 324, 332 (2002). We review issues concerning the proper interpretation of our supreme court rules under a *de novo* standard. *People v. Thompson*, 238 Ill.2d 598, 939 N.E.2d 403, 345 Ill.Dec. 560 (2010) citing *People v. Suarez*, 224 Ill.2d 37, 41-42, (2007).

First, we must note that defendant failed to object at trial and failed to file a posttrial motion raising the issue under Supreme Rule 431(b). Generally, both an objection at trial and a written posttrial motion are required for raising any claimed errors or the error is forfeited. *People v. Enoch*, 122 Ill.2d 176, 186 (1988).

In the alternative, defendant maintains that procedural default is not rigidly applied where the basis of the defense claim is the trial judge’s conduct. In support of this argument, defendant cites to *People v. Sprinkle*. 27 Ill.2d 398, 400-401 (1963). *Sprinkle* says that the forfeiture rule may be relaxed when a trial judge oversteps his or her authority in the presence of the jury or when counsel has been effectively prevented from objecting because it would have “fallen on deaf ears.” *Thompson*, 238 Ill.2d at \*,<sup>1</sup> 939 N.E.2d at 412, 345 Ill.Dec. at 569 citing *People v. Hanson*, 238 Ill.2d 74, 118 (2010) quoting *People v. McLaurin*, 235 Ill.2d 478, 495 (2009).

Here, there is no indication that the trial court would have ignored an objection to its Rule 431(b) questioning. This court presumes that the trial court would have complied with

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<sup>1</sup> Not yet cited.

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mandatory language of Rule 431(b) had the error been pointed out. *Thompson*, 238 Ill.2d at \*, 939 N.E.2d at 413, 345 Ill.Dec. at 570. Furthermore, defendant does not argue that the trial court overstepped its authority in the presence of the jury.

Nonetheless, defendant raises the plain error doctrine in his appellate brief as an exception to afford appellate review of an otherwise forfeited issue.

The plain error doctrine allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence – so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill.2d 551, 559 (2007) citing *People v. Herron*, 215 Ill.2d 167, 186-87 (2005). The burden of persuasion under the plain error rule remains with the defendant. *Herron*, 215 Ill.2d at 186-87. In order to determine whether plain-error is applicable, we must first determine whether any error occurred. *Piatkowski*, 225 Ill.2d at 559.

Illinois Supreme Court Rule 431(b) provides:

The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.

This rule is a codification of the supreme court’s holding in *People v. Zehr* and has been referenced to as the four *Zehr* principles. 103 Ill.2d 472, 477 (1984). In *Zehr*, the supreme court



held that a trial court erred when it refused the defense counsel's request to ask prospective jurors about the four fundamental principles of law now contained in Rule 431(b). *Id.* at 476-78. The supreme court further stated that the jurors' knowledge of these four principles were "essential to the qualification of jurors in a criminal case." *Id.* at 477.

Rule 431(b) has been amended twice, once in 1997 and again in 2007. In 1997, our supreme court amended Rule 431(b) to provide that, *if requested by the defendant*, the trial court must ask potential jurors whether they understood and accepted the *Zehr* principles. 177 Ill.2d R. 431(b) (1997 version). Thus, the 1997 version of Rule 431(b) did not require the trial court to ask about the *Zehr* principles unless defense counsel asked the trial court to do so. In 2007, our supreme court amended the rule again by deleting the words "if requested by the defendant," therefore, requiring the trial court to ask about the four *Zehr* principles regardless of whether or not the defendant had made the request. 177 Ill.2d R. 431(b) (2007 version). As the rule now stands, Rule 431(b) requires a specific question and response process that provides each juror an opportunity to respond to specific questions concerning the Rule's principles, so that the court can determine whether the venire accepts and understands each principle. *Thompson*, 238 Ill.2d at \*, 939 N.E.2d at 409-10, 345 Ill.Dec. at 566-67. Our supreme court has found that the language of Rule 431(b) is clear and unambiguous. *Id.*

Here, the trial court did not admonish the jurors regarding the fourth *Zehr* principle and did not make any inquiries on whether or not the jurors understood and accepted the fourth *Zehr* principle. This court has found that the failure to question prospective jurors about one of the four *Zehr* principles constitutes error. *See People v. Raymond*, 404 Ill.App.3d 1028, 938 N.E.2d 131, 156, 344 Ill.Dec. 862, 887 (2010) (finding that the trial court's failure to mention one *Zehr*

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principle was error); *People v. Glasper*, 234 Ill.2d 173, 189 (2009) (finding that the trial court's failure to question jurors about one principle was error); *People v. Magallanes*, 397 Ill.App.3d 72, 83 (2009) (finding that the trial court's failure to question jurors about one question was error). Therefore, we find that the trial court committed error when it failed to question the jurors about the fourth *Zehr* principle.

Since we have found error, defendant bears the burden of persuasion. Initially, defendant argued that the trial court's failure to question the jurors about the fourth *Zehr* principle required automatic reversal because the error was so serious as to deny defendant a substantial right and, thus, a fair trial.

In *People v. Glasper*, our supreme court held that the failure to comply with Rule 431(b) did not involve a fundamental right or a constitutional protection, and therefore, did not require automatic reversal. 234 Ill.2d at 173, 193 (2009). Instead, our supreme court found that the error involved only a violation of the court's rules, which does not require reversal in every instance. *Id.* The supreme court then stated that "while Rule 431(b) was intended to help ensure a fair and impartial jury, questioning under the rule could not be considered indispensable to a fair trial." *Id.* at 196. However, the holding in *Glasper* was limited to the 1997 version of the rule, which required questioning regarding the *Zehr* principles only if the defendant requested such questioning. *Id.* at 200.

Most recently, our supreme court held in *People v. Thompson* that a trial court's failure to comply with the 2007 version of Rule 431(b) did not automatically result in a biased jury. 238 Ill.2d at \*, 939 N.E.2d at 412, 345 Ill.Dec. at 569. Like in *Glasper*, our supreme court found that a court's questioning is "simply one way of helping to ensure a fair and impartial jury."

In light of the *Thompson* decision, defendant now argues that the failure to comply with Rule 431(b) requires reversal because the evidence in the case was so closely balanced. Defendant focuses on the fact that the State presented only one witness who actually observed defendant that day with the use of binoculars. Defendant contends that the only person who could have rebutted the State's witness's testimony was the defendant himself. Therefore, the evidence did not overwhelmingly establish defendant's guilt, and therefore, the error contributed to the jury's guilty verdict. We find defendant's argument unpersuasive.

In *People v. Hammonds*, the jury found the defendant guilty of the delivery of a controlled substance. 399 Ill.App.3d 927, 957 (2010). At trial, the State presented two police officers, an undercover police officer, who testified that he had purchased crack cocaine from the defendant, and a surveillance officer, who witnessed the undercover purchase. *Id.* A forensic chemist also testified and confirmed that the substance purchased during the undercover buy was cocaine. *Id.* The defendant neither testified nor presented any witnesses on his behalf. We found that the evidence supporting the conviction was overwhelming because no competing witnesses testified at trial, [thus] the jurors "were merely asked to assess the testimony of the two police officers, who fully corroborated each other, and whose testimony was not called into question by a competing witness or cross-examination. *The need for this assessment did not make the evidence 'closely balanced.'*" *Id.* (emphasis added)

Similarly in the case at bar, four officers testified at trial, one of whom was the surveillance officer, who actually saw the defendant engage in four separate drug transactions, and three of whom fully corroborated her story. Additionally, a forensic scientist testified that the substance that was found in the foil packets, which were found in the yellow potato chip bag

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that defendant was handling during the transactions was heroin. Furthermore, defendant did not testify or present any witnesses on his behalf. Therefore, the jurors in the present case, like the jurors in *Hammonds*, were “merely asked to assess” the testimony of the officers and the forensic analyst, which did not make the evidence “closely balanced.”

We cannot say that the evidence was so closely balanced that the error contributed to the jury’s guilty verdict. As a result, the error did not rise to the level of plain error.

### CONCLUSION

While the trial court committed error when it failed to ask the prospective jurors if they understood and accepted the fourth *Zehr* principle, the evidence in the case was not closely balanced so as to contribute to the guilty verdict, and as a result, the error did not rise to the level of plain error.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.